IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-880

THOMAS D. LOWTHER, ET AL.,

*Petitioners,*

v.

STATE OF MARYLAND EMPLOYEES RETIREMENT SYSTEM, ETC., ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## MEMORANDUM FOR THE STATE RESPONDENTS IN SUPPORT

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1. These cases were brought by Montgomery County, Maryland, on behalf of its police officers, and by one of those officers individually and as President of the Police Association of Montgomery County, seeking a declaration that Social Security coverage for Montgomery County police officers could be terminated.

States are permitted to enter into agreements with the Secretary of Health, Education, and Welfare to extend Social Security coverage to employees of state and local governments under the provisions of 42 U.S.C. § 418(a).

A state may terminate such an agreement with respect to any coverage group designated by the state, after five years participation, by giving written notice two years in advance of the termination in accordance with 42 U.S.C. § 418(g)(1)(B).

In 1965, Montgomery County police officers held a referendum and voted in favor of being included in the agreement between the State of Maryland and the Secretary of Health, Education, and Welfare. Social Security coverage for County police officers became effective on May 30, 1965, although an agreement formally extending coverage was not reduced to writing until 1972 (416 F. Supp. 740; Fed. Res. App. 3a to 4a). In April, 1971, another referendum was conducted in which the Montgomery County police officers voted to withdraw from Social Security coverage. The Montgomery County Council informed the State Administrative Officer by a written request to terminate police officer coverage pursuant to 42 U.S.C. § 418(g)(1). The Administrative Officer forwarded this request to the Social Security Administration Regional Commissioner (*Id.* at 740; Fed. Res. App. 4a).

The Regional Commissioner denied this request. The Administrative Officer filed an administrative appeal with the Social Security Commission and, on February 2, 1973, the Commissioner of Social Security took action with regard to that appeal which affirmed the previous denial (*Id.* at 740; Fed. Res. App. 4a).

Petitioners thereafter brought this suit in the United States District Court for the District of Maryland. The District Court held that it had jurisdiction and determined, on the merits, that Montgomery County policemen did not constitute a "coverage group" for the purpose of terminating coverage (*Id.* at 737; Fed. Res. App. 1a-21a). The Court of Appeals vacated the judgment of the district court and remanded the case



for dismissal for want of jurisdiction (561 F.2d 1120; Pet. App. A-1 to A-14). The court held that there was no jurisdiction to present the claim of the policemen to the Social Security Administration since the State had failed to do so.

The decision of the Court of Appeals was inconsistent with the evidence in the record and decision of the District Court Judge in that no request for termination proceeding had been established by the Secretary of Health, Education, and Welfare, and therefore, there was no administrative remedy available.

The evidence presented to the District Court was absolutely clear. A request for termination was made and a final decision was made with respect to that request. The Regional Commissioner, Mr. Dewberry, testified that this request was made, that it was the first request for termination he had ever received in his career and that there was no formal procedure, requirement or format for requesting termination (Dewberry Depo. 65, 67, 69, 77, 78). He further testified that the Secretary of Health, Education, and Welfare denied that request (Dewberry Depo. 79).

The Federal Defendants have asserted, at trial and on appeal, that a proceeding under 42 U.S.C. § 418(s) must be instituted by the State and that, thereafter, the only available jurisdictional base is 42 U.S.C. § 418(t). The Court of Appeals agreed with this contention and so held (561 F.2d 1122; Pet. App. A13 to A14). However, 42 U.S.C. § 418(s) appears to only apply to review of assessments, denials of claims for credits or refunds, or allowances of claims.* The District Court ruled that this section was inapplicable to the instant case (Joint Record Extract E. 25). The Federal Defendants read this section much more broadly than it was applied prior to

* 42 U.S.C. § 418(s) and (t) are set out in full as an Appendix to this Memorandum.

the filing of this suit. The District Court ruled that a final decision on the question of the ability of the Montgomery County policemen to withdraw had been rendered by the Secretary (Joint Record Extract E. 28).

The State Defendants concur with the Petitioners' assertion that the written opinion of the Commissioner denying relief constituted a "final decision" under the principles set out by this Court in *Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Matthews v. Eldridge*, 424 U.S. 319 (1976), and that the District Court did not err in exercising subject matter jurisdiction.

It is therefore respectfully submitted that a Writ of Certiorari should issue to review the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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## APPENDIX

42 U.S.C. § 418

(a) * * *

* * * * * * *

(s) Where the Secretary has made an assessment of an amount due by a State under an agreement pursuant to this section, disallowed a State's claim for a credit or refund of an overpayment under such agreement, or allowed a State a credit or refund of an overpayment under such agreement, he shall review such assessment, disallowance, or allowance if a written request for such review is filed with him by the State within 90 days (or within such further time as he may allow) after notification to the State of such assessment, disallowance, or allowance. On the basis of the evidence obtained by or submitted to the Secretary, he shall render a decision affirming, modifying or reversing such assessment, disallowance, or allowance. In notifying the State of his decision, the Secretary shall state the basis therefor.

(t) (1) Notwithstanding any other provision of this title any State, irrespective of the amount in controversy, may file, within two years after the mailing to such State of the notice of any decision by the Secretary pursuant to subsection (s) affecting such State, or within such further time as the Secretary may allow, is civil action for a redetermination of the correctness of the assessment of the amount due, the disallowance of the claim for a refund or credit, or the allowance of the refund or credit, as the case may be, with respect to which the Secretary has rendered such decision. Such action shall be brought in the district court of the United States for the judicial district in which is located the capital of such State, or, if such action is brought by an instrumentality of two or more States, the principal office of such instrumentality. The judgment of the court shall be final, except that it shall be subject to review in the same manner as judgments of such court in other civil

actions. Any action filed under this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(2) Notwithstanding the provisions of section 2411 of title 28, United States Code [28 U.S.C.S. § 2411], no interest shall accrue to a State after final judgment with respect to a credit or refund of an overpayment made under an agreement pursuant to this section.

(3) The first sentence of section 2414 of title 28, United States Code [28 U.S.C.S. § 2414], shall not apply to final judgments rendered by district courts of the United States in civil actions filed under this subsection. In such cases, the payment of amounts due to States pursuant to such final judgments shall be adjusted in accordance with the provisions of this section and with regulations promulgated by the Secretary.